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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 10/599,311

Filing Date: September 25, 2006

Appellant(s): DAOUSE ET AL.

Robert M. Barrett
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed 02/08/11 appealing from the Office action mailed

05/25/10

(1) Real Party in Interest

The examiner has no comment on the statement, or lack of statement, identifying by name the real party in interest in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings, which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The following is a list of claims that are rejected and pending in the application:
24 and 26-30.

(4) Status of Amendments After Final

The examiner has no comment on the appellant's statement of the status of amendments after final rejection contained in the brief.

(5) Summary of Claimed Subject Matter

The examiner has no comment on the summary of claimed subject matter contained in the brief.

(6) Grounds of Rejection to be Reviewed on Appeal

The examiner has no comment on the appellant's statement of the grounds of rejection to be reviewed on appeal. Every ground of rejection set forth in the Office action from which the appeal is taken (as modified by any advisory actions) is being maintained by the examiner except for the grounds of rejection (if any) listed under the subheading "WITHDRAWN REJECTIONS." New grounds of rejection (if any) are provided under the subheading "NEW GROUNDS OF REJECTION."

(7) Claims Appendix

The examiner has no comment on the copy of the appealed claims contained in the Appendix to the appellant's brief.

(8) Evidence Relied Upon

2670696	Covert, C.J., et al.	03-1954
3171369	Carter, P.H., et al.	03-1965
3552212	Ohlin, E.R.	01-1971

(9) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 24, 26-30 and 44 rejected under 35 U.S.C. 103(a) as being unpatentable over Carter, P.H., et al., (3,171,367) in view of Covert, C.J., et al., (2,670,696) and further in view of Ohlin, E.L. (3,552,212)

Regarding claims 24 and 44, Carter discloses the claimed invention, including, the preparation of a chocolate lined ice cream cone, (element 35, fig. 10) by spraying the interior of the cone with chocolate, (element 37, fig. 11) and filling the interior of the cone with ice cream, which hardens the chocolate layer, (fig. 12, lines 44-60, col.3, '367) but lacks removing excess chocolate, recycling chocolate, and removing particulates from the nozzle.

Covert discloses chilled molds (element 7) are filled [with chocolate by depositing machine, (lines 40-55, col.1, '696) allowing a solid layer of chocolate to form (element 10) and removing the excess chocolate by suction, (lines 10-13, 50-55, col.1, '696) nozzle (element 9) may enter mold substantially to the bottom of the mold cavity, (fig 4, lines 6-10, col.2, '696) the suction is on when the nozzle meets the surface of the liquid in the mold cavity. (lines 1-5, col.2, '696)

The chocolate removed by suction to the vacuum tank, (element 14) and then pumped (element 18) into the chocolate tempering kettle (element 20) which supplies the depositing machine. (lines 25-30, col.2, '696)

However, Covert lacks removing particulates from the nozzle.

Ohlin ('212) discloses a device for cleaning the exterior of an elongated body (element 19) and removing loosely adhering matter, (lines 27-29, col. 1, '212) droplets of the sample may

remain on the inner and outer surface of the pipette, (lines 50-52, col.1, '212) with a collar with a bore slightly larger in diameter than tube is positioned so that the portion of the tube is cleaned as it passes through bore, (abst. '212) tubular probe which is mounted for movement up and down out of and into successive sample containers for withdrawal of the samples therein. (lines 43-45, col. '212) Suction is applied via element 29, to the annular space between the walls of the bore and the take-off tube to cause air or a wash-liquid to flow around the take-off tube and entrain any loosely adhering sample deposits on the outer surface of the take-off tube. (abst, '212)

Carter is involved in the preparation of a chocolate lining in an ice cream cone, by spraying the interior of the cone with chocolate, and is seeking to solve the problem of protecting the cone material from becoming soggy by the subsequent addition of ice cream creating a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream,

Covert is involved in the preparation of chocolate shells by pouring chocolate into a chilled mold, allowing the chocolate to form a solid layer next to the mold surface and removing the excess chocolate by use of suction, such that the action may be relatively rapid and continuous, with high rate of production, and a uniform, high grade product, (lines 13-15, col.3, '696)

Ohlin is using suction to collect a sample, and is seeking to solve the problem of material adhering to the outside of the pipette, by using suction to cause an a gaseous flow, air, to flow across, around and along the pipette tip, removing any adhering material, while the inside of the pipette is cleaned by a liquid and/or a gaseous flow created by suction.

Carter and Covert are seeking to solve the same problem, the formation of thin layers of chocolate, and Covert is removing the excess chocolate from a mold using a suction nozzle,

Ohlin is concerned with a problem concerning the removal of loosely adhering material and the cleaning the exterior of a probe that going from one container to another.

The applicant is blowing air or a gas into the pipette tip to dislodge particulate matter and to carry said particulate matter in the same direction as the previously aspirated chocolate.

Lab technicians routinely use blowing and/or suction creating a gaseous flow to clear adhering matter, whether particulate or liquid, from the interior and the exterior of a pipette.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have modified the chocolate coated ice cream cone machine of Carter, to incorporate the use of excess chocolate and the suction removal of the excess chocolate of Covert, and the cleaning of the pipette of Ohlin, in order to make a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream, and result in a action may be relatively rapid and continuous, with high rate of production, and a uniform, high grade product. Although Covert does not explicitly state that the chocolate recovered from the molds by the nozzle is recycled, he does state that it goes to the tempering kettle and thence to the depositing machines.) It would be obvious to one of ordinary skill in the art that the chocolate recovered in Covert was being recycled for further use.

One of ordinary skill in the art would find it obvious that the nozzle having suction applied and the exterior gaseous air flow (due to suction) of Ohlin would serve the same purpose in a similar manner as the instant application.

Suction and blowing are alternate embodiments that result in similar effects, namely, both processes would result in the movement of material, and a gaseous flow passing through the pipette, either expelling the adhering material or withdrawing the material into the pipette for further disposal would produce the same result and such would have been obvious to the practitioner.

One of ordinary skill in the art would have found it obvious that the modification of the chocolate removal nozzle of Covert with the pipette cleaning collar of Ohlin, would have the suction through the nozzle causing a gaseous flow from the nozzle to the chocolate tempering kettle, and the gaseous (air) flow across, around and along the nozzle due to the suction going to line 29 of the collar of Ohlin, would result in any matter being dislodged from the exterior of the nozzle, being entrained in the gaseous (air) flow going into the nozzle, and the matter would then be carried into the pipette and in the same direction as the chocolate previously aspirated.

Regarding claim 26, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including that the nozzle of Ohlin fits snugly in a sleeve, (Fig. 2 & 3, '212) such that any particulate matter that adheres to the nozzle will be removed during the retraction into the body.

Regarding claim 27, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the nozzle of Ohlin has an opening in the bottom of the nozzle, and the nozzle is retracted into a chamber with an inlet for the admission of gaseous or liquid purges. (Fig.2 & 3, '212)

Regarding claim 28, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the container is a conventional ice cream cone, (line 31, col. 1, '367)

Regarding claim 29, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the coating is chocolate. (lines 37-38, col.4, '367)

Regarding claim 30, Carter, Covert, and Ohlin disclose the claimed invention, as discussed above, including the food product is ice cream. (lines 41-43, col.1, '367)

(10) Response to Argument

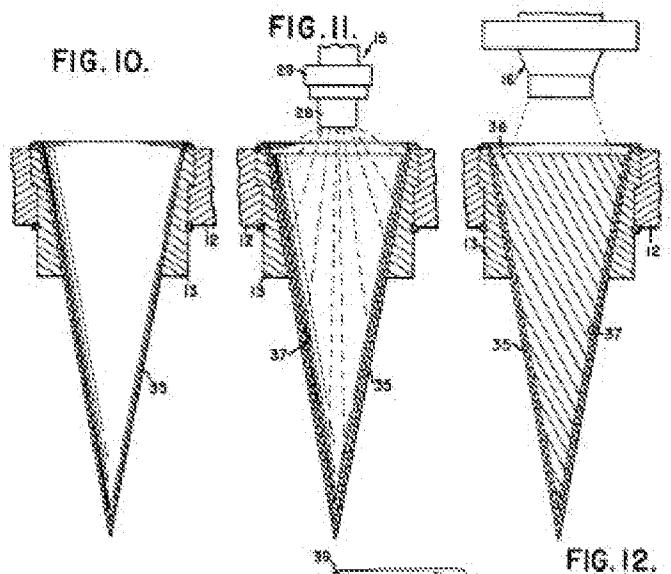
Appellant states that the prior art does not disclose all of the elements of the instant application, and that there is no reason or motivation to combine the prior art.

The instant application consists of the steps of:

1. Spraying a coating (chocolate) on the interior of an ice cream cone,
Sufficient to completely coat the interior of the cone,
2. Removing the excess chocolate with a suction pipette,
3. Recycling the recovered chocolate,
4. Cleaning the pipette by air flow in the same direction as the chocolate flow
5. Cleaning the exterior of the pipette by withdrawing through a bore.

The prior art, Carter discloses the claimed invention, including, the preparation of a chocolate lined ice cream cone, (element 35, fig. 10) by spraying the interior of the cone with liquid chocolate, (element 37, fig. 11) and filling the interior of the cone with ice cream, which hardens the chocolate layer, (fig. 12, lines 44-60, col.3, '367) but lacks removing excess chocolate, recycling chocolate, and removing particulates from the nozzle. The chocolate is liquefied by heat (line 9, col. 3, '367) It would be obvious to one of ordinary skill in the art that

spraying the heated liquid chocolate into the cone would result in some of the chocolate running down the wall of the cone and accumulating in the tip.



Carter states that the ice cream cone, a porous pastry, is protected from the ice cream by a coating of chocolate. Exposure of the cone to ice cream will result in the cone becoming soggy and soft.

However, the cone will become soggy, and become less crisp, from absorption of the chocolate coating. (lines 41-43, 47-51, col. 1, '367)

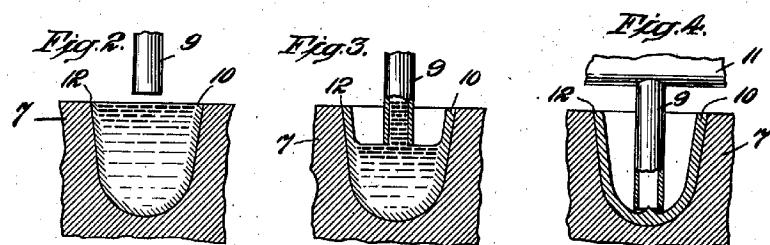
Carter states that coating the interior of the ice cream cone with chocolate and placing the ice cream in, hardens the chocolate and prevents excessive adsorption of the chocolate. (lines 2-7, col. 2, '367)

Therefore, implicit within the disclosure of Carter, is that the coating with chocolate is sufficient to protect the ice cream cone from the moisture of the ice cream, and thus preserving the crispness of the cone.

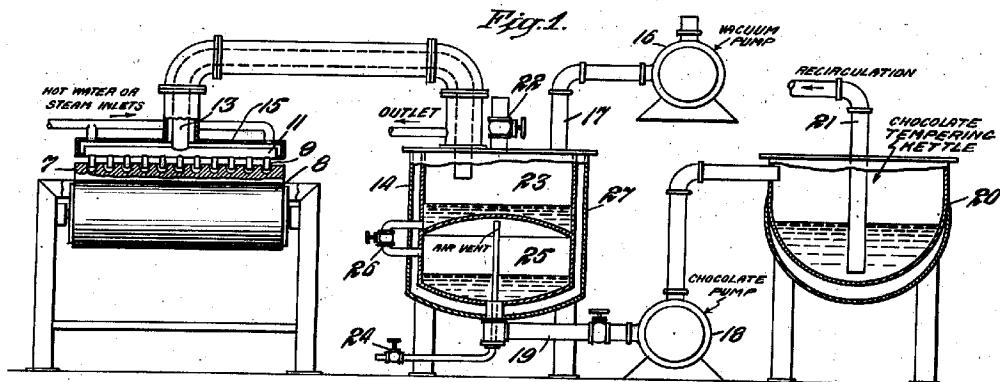
Further, a patent shall be presumed valid. (35 USC 282) The applicant has cited no reference stating that Carter is deficient in applying a complete coating of the interior of the ice cream cone, therefore, one must presume that the coating of Carter is sufficient to fully coat the interior of the ice cream cone, and as discussed above, some unknown amount of the liquid chocolate will accumulate in the tip of the cone.

Carter is involved in the preparation of a chocolate lining in an ice cream cone, by spraying the interior of the cone with chocolate, and is seeking to solve the problem of protecting the cone material from becoming soggy by the subsequent addition of ice cream creating a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream,

Covert discloses chilled molds (element 7) filled [with chocolate by depositing machine, (lines 40-55, col.1, '696) allowing a solid layer of chocolate to form (element 10) and removing the excess chocolate by suction, (lines 10-13, 50-55, col.1, '696) nozzle (element 9) may enter mold substantially to the bottom of the mold cavity, (fig 4, lines 6-10, col.2, '696) the suction is on when the nozzle meets the surface of the liquid in the mold cavity. (lines 1-5, col.2, '696)



The chocolate removed by suction to the vacuum tank, (element 14) and then pumped (element 18) into the chocolate tempering kettle (element 20) which supplies the depositing machine. (lines 25-30, col.2, '696) Covert discloses that the line removing the excess chocolate is heated to keep the chocolate liquid and moveable. (line 20-24, col. 2, '696)



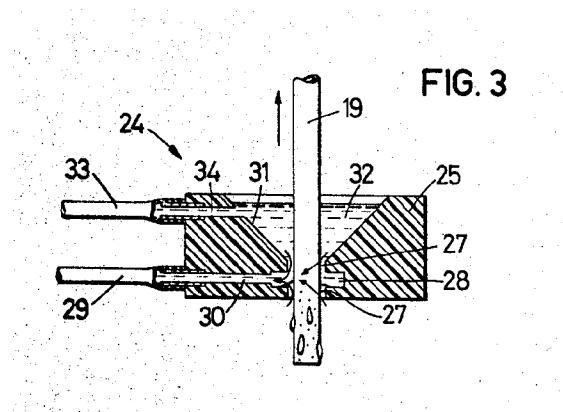
Noting that the suction is on, prior to contact with the surface, it would have been obvious to one of ordinary skill in the art that air was flowing, drawn by the vacuum, in the direction that the chocolate was being removed from the molds, and that the air flowing into the suction nozzle, would serve to keep the nozzle clear of any particulate matter, or congealed chocolate particles.

Covert is directed to the preparation of thin layers of chocolate in molds using a nozzle the traverses the mold, using suction to remove the excess chocolate for subsequent recycling, wherein the thickness of the chocolate layer is determined by the depth the nozzle penetrates into the mold. The mold is chilled, hardening the chocolate into a layer in the mold. The chocolate confection can then be filled and closed, to make a filled chocolate confection. (lines 11-16, col. '696)

However, Covert lacks removing particulates from the exterior of the nozzle.

Ohlin ('212) discloses: a device for cleaning the exterior of an elongated body and removing loosely adhering matter, (lines 27-29, col. 1, '212) droplets of the sample may remain on the inner and outer surface of the pipette, (lines 50-52, col.1, '212) with a collar with a bore slightly larger in diameter than tube is positioned so that the portion of the tube is cleaned as it

passes through bore, (abst. '212) tubular probe which is mounted for movement up and down out of and into successive sample containers for withdrawal of the samples therein. (lines 43-45, col. '212) Suction is applied to the annular space between the walls of the bore and the take-off tube to cause air or a wash-liquid to flow around the take-off tube and entrain any loosely adhering sample deposits on the outer surface of the take-off tube. (abst. '212) (element 29, Fig. 3, '212)



Ohlin claims a device for cleaning an elongated, vertically mounted member, (element 19) comprising a collar (element 25) having a bore encircling said member, forming an annular space, (element 27) suction connected (element 29) to said bore to provide a fluid passageway around the member, air being drawn through annular space entrains any loosely adhering matter from the exterior of the member. (lines 9-27, col. 3, claim1, '212)

Examiner submits that the elements of the claimed invention are delineated above.

As to the motivation to combine:

Carter and Covert are seeking to solve the same problem, the formation of thin layers of chocolate, and Covert is removing the excess chocolate from a mold using a suction nozzle.

Ohlin is concerned with the removal of loosely adhering material and the cleaning the exterior of a probe that going from one container to another.

Ohlin is directed to the cleaning of the exterior of the pipette tip after collection of a sample to remove adhering material, by use of air to entrain and remove any adhering particulates.

It would have been obvious to one of ordinary skill in the art at the time of the invention to have modified the chocolate coated ice cream cone machine of Carter, to incorporate the use of excess chocolate and the suction removal of the excess chocolate of Covert, and the cleaning of the pipette of Ohlin, in order to make a chocolate coated ice cream cone that does not turn soggy with the addition of ice cream, and result in a action may be relatively rapid and continuous, with high rate of production, and a uniform, high grade product. Although Covert does not explicitly state that the chocolate recovered from the molds by the nozzle is recycled, he does state that it goes to the tempering kettle and thence to the depositing machines. It would be obvious to one of ordinary skill in the art that the chocolate recovered in Covert was being recycled for further use.

One of ordinary skill in the art would find it obvious that the nozzle having suction applied and the exterior gaseous air flow (due to suction) of Ohlin would serve the same purpose in a similar manner as the instant application. To the particulate matter or chocolate adhering the inside of the nozzle, the effect of the air flow passing into the nozzle would be the same, whether the air flow was the result of vacuum interior to the chocolate removal system, or

external air directed at the tip of the pipette. Indeed, vacuum is used to complete the removal of the particulate matter to an internal repository.

Further the steps taken by Covert to prevent problems such as solidification of the chocolate, heating of the manifold lines, and keeping the vacuum on, coupled with the pipette cleaning of Ohlin, wherein any entrained matter on the exterior by the use of air flow through an annular space surrounding the bore of the pipette, performs the same function in the same manner as the claimed invention.

One of ordinary skill in the art would have found it obvious that the modification of the chocolate removal nozzle of Covert with the pipette cleaning collar of Ohlin, would have the suction through the nozzle causing a gaseous flow from the nozzle to the chocolate tempering kettle, and the gaseous (air) flow across, around and along the nozzle due to the suction going to line 29 of the collar of Ohlin, would result in any matter being dislodged from the exterior of the nozzle, being entrained in the gaseous (air) flow going into the nozzle, and the matter would then be carried into the pipette in the same direction as the chocolate previously aspirated.

As to the motivation to combine, the applicant states that the field of chocolate confectionary is so large that the respective fields of Carter and Covert would not be considered by one of ordinary skill in the art, seeking to solve a common problem involving maintaining the flow of liquid chocolate, in spraying and removing of chocolate from molds.

Examiner states that both are concerned with the same type of problem, moving liquid chocolate in a trouble free manner, using heat, and air flow.

Ohlin, is also involved in keeping a pipette clean, and removing entrained matter using a close fitting annular space and air flow.

It has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

/JERRY W ANDERSON/

Examiner, Art Unit 1781

Conferees:

/D. Lawrence Tarazano/

Supervisory Patent Examiner, Art Unit 1781

/Rena L. Dye/
Supervisory Patent Examiner, Art Unit 1782